PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd

HIGH COURT (JOHOR BAHRU) — SUIT NO 22-540 OF 1998
ABDUL MALIK ISHAK J
13 MAY 1999

Arbitration *— Procedure — Step in proceedings — Unequivocal election to refer dispute only to arbitration — Whether prayer in defendant's application demonstrated desire to proceed to trial — Whether inclusion of prayer in the application constituted a step in proceedings — Arbitration Act 1952 s 6*

The defendant filed an application for a stay of proceedings pending reference to arbitration under s 6 of the Arbitration Act 1952. In the application, the defendant had included a prayer ('the prayer') for striking out the plaintiff's writ. The plaintiff raised a preliminary objection that the inclusion of the prayer in the defendant's application constituted a step in the proceedings and consequently the defendant was barred from applying for a stay of the proceedings. The senior assistant registrar allowed the preliminary objection and struck out the defendant's application. The defendant appealed.

Held, dismissing the appeal:

(1) A stay will not be granted if the applicant has taken steps in the proceedings after entering appearance in the court proceedings. The applicant must unequivocally elect to refer the matter only to arbitration and nothing else. The conduct of the defendant in seeking the prayer clearly demonstrated a desire to abandon the application for a stay in favour of allowing the matter to proceed to trial. The act of the defendant had the effect of invoking the jurisdiction of the court to proceed to hear the case in open court and not to refer the matter to arbitration nor to stay the matter. By seeking the prayer, the defendant had taken the necessary steps in the proceedings thereby precluding a stay and reference to arbitration. The defendant did not unequivocally elect to refer the matter to arbitration. In the technical sense, the defendant took a step in the proceedings thereby barring resort to s 6 of the Arbitration Act 1952 (see p 22G–I).

(2) Since the plaintiff was opposing the stay, the onus was on them to satisfy the court that there were good grounds for the case to proceed to trial. It was entirely discretionary on the court's part whether to grant the stay of proceedings and refer the matter to arbitration; a discretion that must be exercised judicially. The court was satisfied that there was no sufficient reason for the matter to be referred to arbitration. The plaintiff had discharged the onus to the satisfaction of the court (see pp 21G–22C).

[Bahasa Malaysia summary

Defendan telah memfailkan suatu permohonan untuk penggantungan prosiding-prosiding sehingga rujukan dibuat ke timbang tara di bawah

s 6 Akta Timbang Tara 1952. Di dalam permohonan tersebut, defendan telah memasukkan suatu permintaan ('permintaan tersebut') untuk mengketepikan writ plaintif. Plaintif telah membangkitkan bantahan awal bahawa kemasukan permintaan tersebut di dalam permohonan itu adalah terjumlah kepada langkah dalam prosiding dan mengakibatkan defendan dihalang daripada memohon untuk mengantungkan prosiding. Penolong Kanan Pendaftar telah membenarkan bantahan awal dan telah mengketepikan permohonan defendan. Defendan telah merayu.

Diputuskan, menolak rayuan:

(1) Suatu penggantungan tidak akan dibenarkan jika pemohon telah mengambil langkah di dalam prosiding selepas memasuki kehadiran di dalam prosiding mahkamah. Pemohon mesti secara secara jelas memilih untuk merujuk perkara tersebut ke timbang tara dan tiada apa-apa lagi. Kelakuan defendan di dalam memohon permintaan tersebut dengan jelas menunjukkan suatu kehendak untuk mengabaikan permohonan penggantungan dengan membenarkan perkara tersebut untuk diteruskan ke perbicaraan. Kelakuan defendan mempunyai kesan membangkitkan bidang kuasa mahkamah untuk mula mendengar kes tersebut di mahkamah terbuka dan tidak merujuk perkara tersebut ke timbang tara atau menggantungkan perkara tersebut. Dengan memohon permintaan tersebut, defendan telah mengambil langkah-langkah yang perlu di dalam prosiding dan dengan itu, menghalang suatu penggantungan dan rujukan kepada penimbang tara. Defendan tidak secara jelas memilih untuk merujuk perkara tersebut kepada penimbang tara. Di dalam maksud teknikal, defendan telah mengambil langkah di dalam prosiding dan, dengan itu, menghalang penggunaan s 6 Akta Timbang Tara 1952 (lihat ms 22G–I).

(2) Oleh kerana plaintif membantah penggantungan tersebut, beban adalah terletak di atas mereka untuk memuaskan mahkamah bahawa terdapat alasan-alasan yang baik untuk kes diteruskan ke perbicaraan. Adalah terletak pada budi bicara di pihak mahkamah sepenuhnya sama ada untuk membenarkan penggantungan prosiding atau merujuk perkara tersebut ke penimbang tara; suatu budi bicara yang mesti dijalankan secara kehakiman. Mahkamah adalah berpuas hati bahawa tidak terdapat alasan yang mencukupi untuk perkara tersebut dirujuk kepada penimbang tara. Mahkamah berpuas hati bahawa plaintif telah melepaskan bebannye (lihat ms 21G–22C).]

Notes

For a case on step in proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1003.

Cases referred to

Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208 (refd)
Attorney General of the Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274 (refd)
Austin & Whiteley Ltd v Bowley & Sons (1913) 108 LT 921 (refd)
Bulgaria, The [1964] 2 Lloyd's Reports 524 (refd)
Canterbury Pipe Lines v Christchurch Drainage (1979) 16 BLR 76 (refd)
Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 3) [1970] Ch 506 (refd)
Chatterton v Secretary of State for India in Council [1895] 2 QB 189 (refd)
Cheah Wai Poh v Chin Brothers & Co Ltd [1958] MLJ 215 (refd)
Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui [1978] 2 MLJ 24 (refd)
CM Pillings v Kent Investments (1985) 30 BLR 80 (refd)
Concord Line Co Ltd v The Owners of the Ship 'Molly' [1997] 4 CLJ Supp 285 (refd)
Cotton Corp of India Ltd v United Industrial Bank Ltd & Ors AIR 1983 SC 1272 (refd)
Crown Estates Commissioners v John Mowlem & Co Ltd (1994) 10 Const LJ 311 (refd)
D & C Finance Bhd v Overseas Assurance Corp Ltd [1989] 3 MLJ 240 (refd)
Dobbs v The National Bank of Australasia Ltd (1935) 53 CLR 643 (refd)
Drouth v The Ship 'GG Paul Doumer' [1934] MLJ 72 (refd)
Dyson v A-G [1911] 1 KB 410 (refd)
Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357 (refd)
Eaglesham v McMaster [1920] 2 KB 169 (refd)
East Ham Corp v Bernard Sunley & Sons Ltd [1966] AC 406 (refd)
Eleftheria, The [1969] 1 Lloyd's Rep 237, [1969] 2 All ER 641, [1969] 2 WLR 1073 (refd)
Firth & Sons v De las Rivas & Anor [1893] 1 QB 768 (refd)
Ford v Clarksons Holiday Ltd [1971] 1 WLR 1412 (refd)
Gleeson v J Wippell & Co Ltd [1977] 1 WLR 510, [1977] 3 All ER 54 (refd)
Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (refd)
Heyman & Anor v Darwins Ltd [1942] All ER 337 (refd)
Hindustan Zinc Ltd v Associated Metals & Minerals Corp & Ors AIR 1983 Bom 131 (refd)
Hubbuck's Sons, Ltd v Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 (refd)
Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322 (refd)
Ismail bin Abd Halid & Ors v National Union of Newspaper Workers [1993] 3 MLJ 541 (refd)
Ives and Barker v Willans [1894] 2 Ch 478 (refd)
Kanetra v The Collector AIR 1974 All 431 (refd)

Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198 (refd)
Lamprell v Billericay Union (1849) 18 LJ Ex 282 (refd)
Lan You Timber Co v United General Insurance Co Ltd [1968] 1 MLJ 181 (refd)
Lane v Herman [1939] 3 All ER 353 (refd)
Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)
Lian Seng Construction Co v Yuzin [1970] 1 MLJ 108 (refd)
Lim Seak Huat v Malayan United Realty Sdn Bhd [1997] 5 CLJ 336 (refd)
Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113 (refd)
Minifie v The Railway Passengers Assurance Co (1881) 44 LTR 552 (refd)
National Coal Board v Neill & Son (St Helens) Ltd [1985] QB 300 (refd)
New Great Insurance Co of India v ASA Kampagni AIR 1981 SC 2085 (refd)
Norman v Mathews & Anor (1916) 85 LJ KB 857 (refd)
Northern Regional Health Authority v Derek Crouch Construction Co Ltd [1984] QB 644 (refd)
Pembenaan Keng Ting (Sabah) Sdn Bhd v Seloga Jaya Sdn Bhd [1994] 1 MLJ 422 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309 (refd)
Piya Bhum et al, The [1994] 1 SLR 564 (refd)
Racecourse Betting Control Board v Secretary of State for Air [1944] 1 All ER 60 (refd)
Ranger v GW Railway (1854) 5 HL Cas 72 (refd)
Reichel v Magrath (1889) 14 App Cas 665 (refd)
Rein v Stein [1892] 1 QB 753 (refd)
Resources Mining Pte Ltd v Puteh bte Abdullah & Ors [1989] 3 MLJ 393 (refd)
Robins v Goddard [1905] 1 KB 294 (refd)
Roussel-Uclaf v GD Searle & Co Ltd & GD Searle Co [1978] FSR 95, [1978] 1 Lloyd's Rep 225 (refd)
RM Douglas v Bass (1990) 53 BLR 119 (refd)
Salaman v Secretary of State in Council of India [1906] 1 KB 613 (refd)
Secretary of State for Transport, The v Birse-Farr Joint Venture (1993) 62 BLR 36 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Sim Hiang Kiaw & Ors v Lee Hoi Kim Construction Co [1986] 1 MLJ 347 (refd)
Smith & Service and Nelson & Sons, Re (1890) 25 QBD 545 (refd)
Suncast Sdn Bhd v Padang Indah Sdn Bhd [1999] MCL para 219 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)

Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd [1996] 4 MLJ 154 (refd)
Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd [1993] 3 MLJ 25 (refd)
Tharsis Sulphur and Copper Co v M'Elroy & Sons & Ors(1878) 3 App Cas 1040 (refd)
Usahabina v Anuar Yahya [1998] 2 CLJ Supp 131 (refd)
Vernazza, Re [1959] 1 WLR 622 (refd)
Vinson v The Prior Fibres Consolidated Ltd [1906] WN 209 (refd)
Willis v Earl Howe [1893] 2 Ch 551 (refd)
Woh Hup (Pte) Ltd & Anor v Turner (East Asia) Pte Ltd [1987] 1 MLJ 443 (refd)

Legislation referred to

Arbitration Act 1952 s 6
Arbitration Act 1889 s 4 [Eng]
Arbitration Act 1950 s 4(1) [Eng]
Arbitration Ordinance 1950 s 5(1)
Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 s 6
Rules of the High Court 1980 O 12 r 6, O 18 r 18(1), r 19(1), Form 16

Ng Chew Hor (*Paul Tan Liak Tong* with him) (*Paul Tan Looi & Associates*) for the appellant.
S Sagadeva (*JS Pillay* with him) (*JS Pillay & Co*) for the respondent.

Abdul Malik Ishak J:

The appeal and the preliminary objection

This was an appeal in encl 29 by the defendant appellant (Bimacom Property & Development Sdn Bhd) against the decision of the senior assistant registrar ('SAR') allowing a preliminary objection raised by the plaintiff respondent (PP Persero Sdn Bhd) and striking out the defendant appellant's application in encl 17.

The preliminary objection raised by the plaintiff respondent went like this: that the inclusion of prayer (1) in encl 17 constituted a step in the proceedings and, consequently, the defendant appellant was barred from applying for a stay Or the proceedings pending reference to arbitration under s 6 of the Arbitration Act 1952. In encl 17, the defendant appellant sought for the following prayers:

1 Bahawa tindakan plaintif dibuang mengikut A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980;

2 Secara alternatif, bahawa semua prosiding selanjutnya dalam tindakan ini digantung menurut s 6 Akta Timbangtara 1952, dimana perkara-perkara yang berhubung dengan mana tindakan di bawa hendaklah di rujuk kepada timbangtara;

3 Bahawa plaintif membayar kepada defendan kos tindakan ini termasuk kos untuk permohonan ini;

4 Lain-lain relif yang dianggap adil berpatutan dan suaimanfaat oleh Mahkamah Yang Mulia ini. A

Mr. Ng Chew Hor, learned counsel for the defendant appellant, eloquently argued that although the application in encl 17 prayer 2 specifically referred to s 6 of the Arbitration Act 1952, the defendant appellant was not barred, legally speaking, from seeking the court to invoke its inherent jurisdiction to B have the proceedings stayed and the dispute referred to arbitration. Indeed the phrase 'inherent jurisdiction' has been bandied about in this court on many occasions. Sir Jack Jacob in his article entitled: 'The Inherent Jurisdiction of the Court' as reported in [1970] CLP 23 at p 51 said of that phrase to be:

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> ... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

But it must be emphasised that the inherent power of the court cannot be D invoked to nullify or stultify a statutory provision: *Cotton Corp of India Ltd v United Industrial Bank Ltd & Ors* AIR 1983 SC 1272. Notwithstanding this cardinal principle of law, Lee Hun Hoe CJ (Borneo) in *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui* [1978] 2 MLJ 24 in apt terms observed that:

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> Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or constitute an abuse of its process.

In *Re Vernazza* [1959] 1 WLR 622, Lord Parker CJ speaking for the Queen's Bench Division (Lord Parker CJ, Donovan and Salmon JJ) F observed at p 624:

> In considering whether any proceedings are vexatious one is entitled to, and must look at, the whole history of the matter, and it is not determined by whether the pleading discloses a cause of action. Indeed, that is the principle applied under the rules of court when application is made to strike out a G pleading. Though the pleading may be in order, the court, in its inherent jurisdiction, is entitled to look at affidavits as to the history of the matter, and if, in the light of that history the action is vexatious, the pleading can be struck out and the action dismissed. This is a clear case and there must be the order prayed.

Obviously the court has an inherent jurisdiction to stay all proceedings H before it which are frivolous, vexatious or an abuse of its process (*Reichel v Magrath* 14 App Cas 665) and that power to stay is entirely discretionary (*Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510, [1977] 3 All ER 54; and *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 3)* [1970] Ch 506). It is said that the inherent jurisdiction is an unusual weapon bestowed on the I court and when the parties implore the court to exercise and invoke its inherent jurisdiction, all the facts must be examined and the affidavits as to the facts are said to be admissible (*Willis v Earl Howe* [1893] 2 Ch 551 at p 554; *Vinson v The Prior Fibres Consolidated Limited* [1906] WN 209; and

Norman v Mathews & Anor [1916] 85 LJ KB 857). The court too has an inherent jurisdiction to stay an action which must necessarily fail (*Salaman v Secretary of State in Council of India* [1906] 1 KB 613) — a classical example would be an action in respect of an act of State (*Chatterton v Secretary of State for India in Council* [1895] 2 QB 189). I did say in *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 at p 348 to the following effect:

> The sum total of these authorities lay down the principle that when an application is made to the inherent jurisdiction of the court, all the facts can be looked into and the affidavits as to the facts are admissible in evidence.

Conditional appearance

Reverting back to the mainstream of the case, it must be emphasised that there was no hearing on the merits of encl 17. Prior to filing encl 17, the defendant appellant had filed encl 9 on 4 September 1998 by way of a summons in chambers for leave to enter conditional appearance under O 12 r 6 of the Rules of the High Court 1980 ('RHC'). Encl 9 was supported by an affidavit of Tan Kok Cheng that was affirmed on 3 September 1998 and marked as encl 8. Briefly, encl 8 adverted to an arbitration clause where it was stated that the dispute and the difference shall be referred to arbitration. The SAR granted the defendant appellant's application in encl 9 for conditional appearance to be filed and without wasting precious time the defendant appellant filed their conditional appearance as reflected in encl 11. Mr. Ng Chew Hor argued that the conditional appearance followed the standard format as prescribed by the RHC. Indeed, O 12 r 6 of the RHC states as follows:

> (1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.
>
> (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under r 7 and the Court makes an order thereunder.

The English translation Or the Memorandum of Conditional Appearance in encl 11 followed dutifully the format as set out in Form 16 and it was worded thus:

> *Memorandum of Conditional Appearance*
>
> Enter conditional appearance (or appearance under protest for Bimacom Property & Development Sdn Bhd) without prejudice to an application to set aside the writ (or service of the writ).
>
> Dated the 4 September 1998
>
> Sgd (Illegible)
>
> .....
>
> Messrs Paul Tan Looi & Associates
> Solicitor for the defendant

The place of business of Messrs. Paul Tan Looi & Associates is at Level 3, Menara Bukit Meldrum, Jalan Tenteram, 80300 Johor Bahru, Johor. A

His address for service is at Messrs. Paul Tan Looi & Associates, Level 3, Menara Bukit Meldrum, Jalan Tenteram, 80300 Johor Bahru, Johor.

Note:

Every conditional appearance and duplicate is sealed on entry with the following stipulation: B

> 'This appearance is to stand as unconditional unless the defendant applies within fourteen (14) days to set aside the writ, or service thereof, and obtains an order to that effect'.

It is apparent that every conditional appearance will prescribe or stipulate a time within which the application to set aside the writ or the service of the writ is to be made. Thus, the consequence of the failure to comply with the condition upon which conditional leave is given is to render the conditional appearance becoming unconditional appearance. It becomes unconditional unless the defendant appellant makes the application within the time stated. On the effect of an unconditional appearance, I had this to say in *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336, particularly at p 357: C D

> Now, what is the effect of an unconditional appearance ? It is said to be a waiver of any irregularity there may be and an entire submission to the jurisdiction of the court (*Sheldon v Brown Bayley's Steel Works & Dawnways Ltd* [1953] 2 QB 393; [1953] 2 All ER 894 (CA); and *Re Orr-Ewing* 22 Ch D 463). E

According to the case of *Rein v Stein* [1892] 1 QB 753 the entry of a conditional appearance or for that matter an appearance under protest as envisaged in *Firth & Sons v De las Rivas & Anor* [1893] 1 QB 768 are necessary in some cases because it would bar judgment in default of appearance while the application to set aside the service of the writ are pending. It is also said that the effect of O 12 r 6 of the RHC is to enable a defendant to prevent a judgment in default being entered against him while at the same time remaining entitled to object to any irregularity in the issue or service of the writ or to the jurisdiction of the court. To me the term or the phrase 'conditional appearance' means no more than an appearance in qualified terms, reserving to the defendant who has entered an appearance the right to apply to the court to set aside the writ, or service thereof, for an alleged informality or irregularity which renders either the writ or service invalid or lacking in jurisdiction. F G

Mr Ng Chew Hor submitted that the defendant appellant had filed a conditional appearance on a specified ground to the effect that the subject matter of the action should be stayed or referred to arbitration. H

With respect, the memorandum of conditional appearance in encl 11 merely adverted to the desire of the defendant appellant 'to set aside the writ (or service of the writ)' and nothing else. Mr Ng Chew Hor lamented his despair. He said that the defendant appellant had no choice but to include in the memorandum of conditional appearance the condition that an application to set aside the writ should be filed within the prescribed time because it had to comply with the prescribed format in Form 16 of the RHC. Thus, according to Mr Ng Chew Hor the inclusion in encl 17 of the I

A prayer for striking out the writ cannot amount to an affirmation of the proceedings and cannot be construed as taking a step in the proceedings. It must be recalled that the defendant appellant had filed encl 9 for leave to enter conditional appearance. Mr Ng Chew Hor advanced a reason for filing encl 9. He said that he was merely following the decision of *Usahabina v Anuar Yahya* [1998] 2 CLJ Supp 131, where the court held that an entry B of an unconditional appearance amounted to a step in the proceedings. He too said that from encl 8 — the affidavit in support for leave to enter conditional appearance in encl 9, the intention to file the conditional appearance arose out of the desire by the defendant appellant to enforce the arbitration clause agreed to in the agreement between the parties. All these C submissions were germane as it assisted me to adjudicate on encl 29 effectively. I will now proceed to the heart of the matter.

Arbitration clause

Clause 48 of the agreement was worded thus:

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48 Arbitration

48.1 If any dispute or difference shall arise between the Employer and the Contractor, either during the progress or after completion of the works or after the purported termination of this Contract by either party, as to:

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(a) the construction of this Contract; or

(b) any matter or thing of whatsoever nature arising hereunder or in connection herewith (including the correctness of any certificate issued by the Employer's Architect and/or any opinion/ valuation ex pressed by the Employer's Architect);

F then such dispute or difference shall be referred to the arbitration and final decision of a single Arbitrator to be agreed upon by the parties within 7 days of a notice from one party to the other proposing the name of the Arbitrator, failing which either party may apply to the President for the time being of the Malaysian Bar Council to nominate such person as the Arbitrator, and the parties hereby irrevocably and unconditionally accept and agree to appoint G such person as the agreed single Arbitrator.

48.2 The Arbitration shall be in English Language and shall take place in Kuala Lumpur and the Arbitrator shall give a non-speaking award.

48.3 The Arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters H in dispute which shall be submitted to him, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

48.4 Upon every or any such reference the costs Or and incidental to the reference and award shall be in the discretion of the Arbitrator who may determine the amount thereof, or direct the amount to be as I between solicitor and client or as between party, and shall direct by whom and to whom and in what manner the same to borne and paid.

48.5 The award or the Arbitrator shall be final and binding on the parties.

and the general tenor of the law is that a contract providing for arbitration cannot, apart from statute, prevent the institution of an action or suit. This is so even though an actionable breach of contract was committed by the refusal to refer to arbitration (*Re Smith & Service and Nelson & Sons* (1890) 25 QBD 545). The common law position was neatly summarised by the High Court Or Australia in *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643 in these words:

> What no contract can do is to take from a party to whom a right actually accrues, whether ex contractu or otherwise, his power of invoking the jurisdiction of the courts to enforce it.

This passage from Dobbs was favourably cited by the Federal Court in the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 (FC) and Gopal Sri Ram JCA writing for the Federal Court at pp 278–279 explained further the ramifications at common law in these resounding words:

> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosoply behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants.

Clause 48.1(b) as reproduced spoke of 'any certificate issued by the Employer's Architect' and a certificate of this nature involves an element of assessment and judgment. A very subjective process. As Hobhouse J in *The Secretary of State for Transport v Birse-Farr Joint Venture* (1993) 62 BLR 36 at p 53 remarked:

> Certification may be a complex exercise involving an exercise of judgment and an investigation and assessment of potentially complex and voluminous material. An assessment by an engineer of the appropriate interim payment may have a margin of error either way .. . At the interim stage it cannot always be a wholly exact exercise. It must include an element of assessment and judgment. Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair system of monthly progress payments to be made to the contractor.

Thus, some estimates are mere approximation (*Tharsis Sulphur and Copper Co v M'Elroy & Sons & Ors*(1878) 3 App Cas. 1040 (HL); and *Canterbury Pipe Lines v Christchurch Drainage* (1979) 16 BLR 76 at p 95 (New Zealand CA), while others would proceed to the quantum and determine that quantum. Such certificates, however, are not binding on the parties in so far as quality or amount are concerned but they are subject to adjustment on completion (*Lamprell v Billericay Union* (1849) 18 LJ Ex 282). It seems to me that an employer who has a bona fide arguable contention to advance to the effect that an interim certificate overvalues the contractor's right to

payment has an existing remedy and that would be to resist proceedings for summary judgment on that sole ground (*CM Pillings v Kent Investments* (1985) 30 BLR 80 (CA); and *RM Douglas v Bass* (1990) 53 BLR 119).

There are varied possibilities on the effect of an arbitration clause upon the conclusiveness of a certificate. I propose to advance a few of them. Firstly, it would totally be dependent upon the words of the contract and the certificate may be conclusive evidence in a court of law (*Re Meadows and Kenworthy* [1896] 2 HBC (4th Edn) 265 (CA), affirmed by the House of Lords); and *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406 (HL)). Secondly, the certificate may not be conclusive at all and even the wording of the arbitration clause may indicate that the certificate was not intended to be binding at all (*Robins v Goddard* [1905] 1 KB 294 (CA); *Ranger v GW Railway* (1854) 5 HL Cas 72 (HL); and *National Coal Board v Neill & Son (St Helens) Ltd* [1985] QB 300 at p 309). Thirdly, the certificate may be construed to be conclusive in a Court of law but subject to review by arbitration under the arbitration clause enshrined in the contract (*Eaglesham v McMaster* [1920] 2 KB 169; and *Crown Estates Commissioners v John Mowlem & Co Ltd* (1994) 10 Const LJ 311 (CA)). Finally, the certificate or award is conclusive as envisaged in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644 (CA)).

Section 6 of the Arbitration Act 1952 enacts as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

and it gives the High Court the power to grant stay of all proceedings before it in any action initiated by a party to arbitration on an application by a party seeking to have the disputes or differences resolved through arbitration. That the High Court has an unfettered discretion under s 6 of the Arbitration Act 1952 is undeniable. The use of the word 'may' in s 6 of the Arbitration Act 1952 gives the impression that despite all the stated conditions being satisfied to the brim, the High Court has still that unfettered power to order a stay of all the proceedings. It is, after all, a matter of discretion to be exercised by the High Court. Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 112 in style said:

> It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it.

Speaking on the effect of s 4 of the English Arbitration Act 1889 particularly in regard to the question of discretionary power, Lord Macmillan in his speech in the House of Lords in *Heyman & Anor v Darwins Ltd* [1942] All ER 337 at p 355 aptly said:

> The Arbitration Act 1889, s 4, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not *ex debito justitiae*. Though the dispute is clearly within the arbitration clause, the court 'may' still refuse to stay if, on the whole, that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under s 4, always subject to the discretion of the court.

To me, it goes without saying, as the night follows the day, that the discretion reposed in the court whether to stay or not to stay the proceedings is a judicial one and that discretion must be exercised having regard to the particular circumstances of each case. No two cases are the same.

Onus of proof

By way of an analogy, reference should be made to the case of *Drouth v The Ship 'GG Paul Doumer'* [1934] MLJ 72 which was in relation to an application for a stay of an action in rem activated by the charterer of a ship and there Gerahty J had this to say on the burden of proof .

> It is also settled law that the burden of showing cause why the agreement to submit should not be given effect to is upon the party opposing the application to stay.

and, consequently, if the burden is not discharged, then legal proceedings will be stayed and the disputes referred to arbitration. In similar vein, Raja Azlan Shah J (as His Majesty then was) in *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 remarked:

> Where a party seeking stay of the legal proceedings is shown to have satisfied all the conditions stipulated by the provision, the onus will then be on the party, that is the plaintiff (who wants to keep out of arbitration) to satisfy the court that there are good grounds for the case to proceed.

Simply put, the onus of showing why the differences between the parties should not be referred to arbitration is on the party opposing the stay application (*Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] MLJ 215; *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113; *Heyman & Anor v Darwins Ltd*; The case of The Eleftheria [1969] 1 Lloyd's Rep 237, [1969] 2 All ER 641, [1969] 2 WLR 1073; *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181; *D & C Finance Bhd v Overseas Assurance Corp Ltd* [1989] 3 MLJ 240; *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20; *Ford v Clarksons Holiday Ltd* [1971] 1 WLR 1412 and *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154). It would not be out of place, at this juncture, to refer to the judgment of Hashim Yeop A

Sani CJ (Malaya) in the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 (SC). There in brilliant style his Lordship said at p 314 of the report:

> Once it is established that there has arisen a dispute or difference or question, the language of s 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

Further down the same page, his Lordship continued:

> To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed.

I will pause here for a moment. I will now proceed to the other issues.

Stay of proceedings, a step in the proceedings and reference to arbitration

Mr Ng Chew Hor drew my attention to the case of *Racecourse Betting Control Board v Secretary of State for Air* [1944] 1 All ER 60 and he said that the power of the court to stay proceedings can be seen in the judgment of MacKinnon LJ when his Lordship said at p 65 of the report the following words:

> In each of those, the contract of the parties provided for the decision of any dispute by a foreign court, in each one of the parties brought an action in breach of his agreement, and in each his action was stayed. It is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under the Arbitration Act 1889, s 4. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will rest rain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.

Mr Ng Chew Hor then proceeded to submit as follows. He said that encl 17 was supported by an affidavit in encl 16 and he laid stress on para 3 thereof and it was his contention that a dispute was in existence even before the plaintiff respondent filed the writ and for this very reason the dispute should be referred to arbitration. He also submitted that by way of para 5 of encl 16 the defendant appellant was able and willing to refer the matter to arbitration. It was ingeniously argued that since the defendant appellant in encl 16 categorically stated that the matter or dispute should be referred to arbitration then that very assertion cannot amount to an affirmation of the proceedings and be regarded as taking a step in the proceedings as found by the SAR. The case of *Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] MLJ 215 was used to its optimum point by Mr Ng Chew Hor. That case lays down the following principle of law: An entry of unconditional appearance

is not 'taking any other steps in the proceedings' within the meaning of s 5(1) of the Arbitration Ordinance. 'Steps in the proceedings', in the technical sense, means an application to the court such as taking out a summons; the act must display an intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. *Cheah Wai Poh v Chin Brothers* was a case decided by Syed Sheh Barakbah J and there his Lordship after referring to some authorities forthwith stayed further proceedings. This was what his Lordship said at p 217:

> According to the learned counsel for the defendant the entry of appearance was merely to prevent judgment being obtained by default. I agree with this submission.

I have done some research and the research showed a trend that cannot be of any help to either party. All the authorities in regard to arbitration can never be reconciled with one another. Perhaps the best guide would be found in the passages of a book entitled *Russel on Arbitration* (20th Ed) at p 421 where under the heading 'step in the proceedings' the learned author said:

> The reported cases are difficult to reconcile and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his rights to a stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court.

Going into the arena of admiralty but still on the issue of what constitutes a step in the proceedings, the case of *Concord Line Co Ltd v The Owners of the Ship 'Molly'* [1997] 4 CLJ Supp 285 merits reference. In that case the defendant had entered conditional appearance and later filed an unqualified ball bond for the release of the vessel 'Molly on 12 September 1996. Subsequently, the defendant applied by way of a notice of motion for a stay of the proceedings under s 6 of the Arbitration Act 1952 or under s 6 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Convention Act') or under the inherent jurisdiction of the court to refer the matter to arbitration in London. The court held that the admiralty jurisdiction of the court had been properly invoked and the court had the jurisdiction to hear and determine the claim on its merits. In filing the unqualified bail bond the defendant has had the benefit of legal advice from international as well as local solicitors, and having done so, the court held that the defendant had submitted to the jurisdiction of the court. The court also held that the mandatory right of the defendant to apply for a stay under s 6(1) of the Convention Act had been watered down by the defendant's act of taking a step in the proceedings when that unqualified bail bond was filed on 12 September 1996. The court also held that the defendant could have filed a qualified bail bond and that would have prevented the bail bond from being construed as a step in the proceedings (see *The 'Bulgaria'* [1964] 2 Lloyd's Reports 524). But alas, so the court held, the defendant though represented by qualified international and local solicitors did not seek to amend or vary the unqualified bail bond. These solicitors should know and ought to know about the decisions of the courts

A in regard to varying the terms of the unqualified bail bonds as was done in The 'Bulgaria' and as applied in *The Piya Bhum et al* [1994] 1 SLR 564, yet, so the court held, they saw it fit not to vary the unqualified ball bond. The court too held that even though the defendant through its solicitors gave notice that the bail was given without prejudice to the rights of the defendants to apply for the suit to be stayed or struck out, yet the wording B of the unqualified bail bond did not bear out the defendant's intention. Finally, the court held that in filing an unqualified bail bond in the present admiralty proceedings, the defendant had submitted unequivocally to the admiralty jurisdiction of the court to hear and determine the plaintiff's claim on its merits.

C The case of *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 lays down the proposition that the applicant should apply for a stay before taking any step in the proceedings after appearance. There is a difference between our s 6 of the Arbitration Act 1952 and the English Arbitration Act 1950 and I have said this in the unreported case of *Suncast Sdn Bhd v Padang Indah Sdn Bhd* Civil Suit No 22-336-1997. This D what I said in Suncast Sdn Bhd:

> Before I proceed further, it is germane to mention that our s 6 of the Act are differently worded from s 4 (1) of the English Arbitration Act 1950. To illustrate, I will now reproduce s 4 (1) of the English Arbitration Act 1950:
>
> 4 Staying court proceedings where there is submission to arbitration.
>
> E (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other F steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may G make an order staying the proceedings.
>
> The phrase 'at any time after appearance, and before delivering any pleadings or' are notably absent in our s 6 of the Act and the reason for this absence may lie in the fact that our Act was born in 1952 whereas the English Arbitration Act was enacted in 1950.

H and I too sounded a warning in the same case to this effect:

> As alluded to earlier there is a stark contrast between the English Arbitration Act 1950 and our Act as the former provides for the entry of appearance before applying for a stay of proceedings. Thus, there is the danger of indiscriminate reliance on English law especially on points of procedure. This was also the view of Reay J in *Leonard v Nachiappa Chetty* 4 FMSLR 265 when I his Lordship commented:
>
> > 'Before reliance can be placed on English decisions, particularly decision on points of procedure, it is necessary in the first instance to examine carefully our local law to ascertain what it is and in what respects it

> resembles or differs from the English Law. This seems a self evident proposition, but it is nevertheless too often over-looked by counsel'.

The expression 'steps in the proceedings' appearing in s 6 of the Arbitration Act 1952 as well as in s 4 of the English Arbitration Act 1950 has given rise to a series of claims and contentions bringing to the forefront one single thread. That thread would be this. That a stay will not be granted if the applicant has taken steps in the proceedings after entering appearance in the court proceedings. The applicant must unequivocally elect to refer the matter only to arbitration and nothing else (*Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 (SC)). As I said the authorities in regard arbitration are at divergence and rather difficult reconcile. *Russel on the Law of Arbitration* (the 20th edition of the book by authors Walton and Victoria as referred to in *Pembenaan Keng Ting (Sabah) Sdn Bhd v Seloga Jaya Sdn Bhd* [1994] 1 MLJ 422) was of the view that the filing of affidavits and the contesting of proceedings for an interlocutory injunction were not in A11 considered as a step in the proceedings. Mathur J Queens College, *Kanetra v The Collector* AIR [1974] All 431 tersely said:

> I am unable to accept the contention that taking steps to set an ex parte injunction vacated amounts to taking such a step in the suit as would disentitle the defendants for applying for a stay under s 34 of the Indian Arbitration Act.

Next, would be the case of *Roussel-Uclaf v GD Searle & Co Ltd & GD Searle Co* [1978] FSR 95, [1978] 1 Lloyd's Rep 225 where the court held that the meaning to the expression a step in the proceedings to be some positive procedural act by way of an offence on the part of the defendant rather way merely parrying a blow by the plaintiff, particularly where the attack consisted of asking for an interlocutory injunction. At this juncture, germane to reproduce that part of the judgment of Graham J in Roussel-Uclaf's case where his Lordship observed:

> On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalize Searle (UK) in that respect. I do not think the present case is covered by the authority of *Pitcher's* case (*Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] All ER 151) and it seems to me that the reasoning of Stirling in the Zalinoff case (*Zalinoff v Hammond* [1898] 2 Ch 92) is more pertinent to the circumstances here where an application for an injunction was being resisted. I therefore hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.'

In *New Great Insurance Co of India v ASA Kampagni* AIR 1981 SC 2085; and *Hindustan Zinc Ltd v Associated Metals & Minerals Corp & Ors* AIR 1983 Bom 131, the Indian courts declined to grant stay of proceedings filed in defiance of the agreement to arbitrate abroad. The court in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322 held that an attempt to obtain an interlocutory injunction will not amount to taking a step in the proceedings. Zakaria Yatim J (now FCJ) adopts a liberal approach in *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198. I will now elaborate. In Kirames Sdn Bhd, the plaintiff and the defendant there had entered into a contract where the defendant was to supply to the plaintiff reinforced spun concrete pipes. That contract contained an arbitration clause. The parties were at loggerheads and certain disputes arose. The plaintiff commenced proceedings and obtained an ex parte injunction seeking status quo pending the outcome of the suit and also sought certain reliefs. The defendant then applied to stay the proceedings under s 6 of the Arbitration Act 1952 and an order for stay was granted by consent of the parties. One of the issues that Zakaria Yatim J (now FCJ) had to consider was whether the defendant after obtaining an order for a stay by consent, was entitled to proceed with the application to set aside the injunction. Zakaria Yatim J (now FCJ) gave his learned opinion in this manner (see p 200 of the report):

> In my opinion, although a consent order for stay of proceedings has been obtained, the defendant is still at liberty to proceed with the application. Even before an order for stay Or proceedings was obtained, that is, when the applicant must not take any other steps in the legal proceedings, it is entitled to ask for an interlocutory injunction or to apply to set aside an ex parte injunction.

Still on the meaning behind the expression 'step in the proceedings', reference should also be made to the speech of Lindley LJ in the case of *Ives and Barker v Willans* [1894] 2 Ch 478 where his Lordship said at p 484, second paragraph:

> The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, not the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

Luxmoore LJ writing for the Court of Appeal in *Lane v Herman* [1939] 3 All ER 353 (Luxmoore and du Parcq LJJ and Humphreys J) endorsed the speech Or Lindley LJ in *Ives and Barker v Willans*, and Luxmoore LJ said at p 356 of the report:

> I think that what was said by Lindley, LJ, is really the best guide to what is a step in the proceedings in a case of this kind. It must be a step taken in the proceedings in the technical sense if it is to be held to bar an application for a stay under s 4. In this case, there was no step taken in any technical sense. I think Tucker J, was right, and the appeal must fail, with the usual consequences.

In 1913, the King's Bench Division comprising of Ridley and Avory JJ had occasion to consider the meaning behind the words 'a step in the

proceedings' in the case of *Austin & Whiteley Ltd v Bowley & Sons* (1913) 108 LT 921 and there Ridley J in a short separate judgment observed at p 921: A

> In my opinion what is intended by a step in the proceedings is some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter should be referred to arbitration. I cannot see how in common sense the words of s 4 can apply to something which a defendant has to do in order to save himself from having execution levied upon his goods. That is all the defendants desired to do here when they gave notice to defend. That being so, I think this appeal must be allowed. B

As to what constitutes taking steps in the proceedings reference should be made to the case of *Sim Hiang Kiaw & Ors v Lee Hoi Kim Construction Co* [1986] 1 MLJ 347. In that case the defendants applied for an order that all further proceedings in the action be stayed pursuant to s 6 of the Arbitration Act 1952 on the ground that the parties had by an agreement in writing of 12 October 1979 agreed to refer to arbitration the matters in respect of which this action was brought. The sole issue for decision was whether the defendants, before applying to court for stay of proceedings and having the matters referred to arbitration, had taken 'any other steps in the proceedings'. The defendants had appeared and attended the hearing of the summons for directions without any objection or qualification. It was held that the defendants had already taken a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952. Tan Chiaw Thong J delivering the judgment of the court had this to say (see pp 347–348 of the report): C D E

> Arguments have been addressed to the court in relation to the filing of the Defence and Counterclaim and the application to the advocates for the plaintiffs for extension of time within which to do that, but in my view, irrespective to whether such actions taken by the defendants in this connection constitute a step taken in the proceedings, the crucial matter is whether by appearing and attending the hearing of the Summons for Directions without any objection or qualification, this constitutes a step taken by the defendants in the proceedings. In *Russell on Arbitration* (20th Ed) p 172, para 6, it is there stated that 'The court has no discretion to stay, if the defendant allows the action to continue'. In this connection, I am of the view that whether appearing at and attending the hearing of the Summons for Directions constitutes a step in the proceedings is governed by authority. I would in this connection refer to the case of *The County Theatres and Hotels, Limited v Knowles* [1902] 1 KB 480. F G

Similarly the court in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 held that where a party to an arbitration clause in a court action entered an appearance and filed a defence, that party was precluded from taking advantage of the remedy of arbitration. Likewise in the case of *Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25 the Supreme Court held that taking part in garnishee proceedings without in any manner questioning the jurisdiction of the court to try the main action would amount to a waiver of the right to go to arbitration. H I

A It is interesting to examine the following questions:

(1) What must a party seeking a stay of the court proceedings do? According to the case of *Ford v Clarksons Holiday Ltd* [1971] 1 WLR 1412 that party in seeking a stay of the court proceedings must successfully establish that there are sufficient reasons as to why the differences should be referred arbitration. As to what constitutes sufficient reason, the case of *Minifie v The Railway Passengers Assurance Company* (1881) 44 LTR 552 should be an eye-opener. In that case, Pollock B. observed:

> In the first place, such reasons may exist apart from the nature of the issue between the parties, such as that the defendants have omitted to apply to the court or a judge within a reasonable time, or by their dealing with the claimant have led him to suppose that they would not object to a trial by jury, and in either of these cases the plaintiff might have incurred expenses in preparing for trial, which would be thrown away if the matter went to arbitration. Other cases again, which are more likely to occur, are those in which the subject matter of contention or the particular evidence to be adduced by the plaintiff or the defendants may be such as ought to induce the court or a judge to act upon the power conferred by this section.

(2) How can the court exercise its discretion in granting a stay of the proceedings pending reference to arbitration ? The answer can be found in the judgment of Raja Azlan Shah J (as His Majesty then was) in the case of *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181. His Majesty had this to say at p 182 of the report:

> It will be observed that under s 5 of the Arbitration Ordinance it is not a simple matter of discretion to be exercised by the court. In order to exercise the discretion, the court must first of all be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission; in other words, the terms of s 5 mean that the court must hold the parties to their contract, provided they submit to arbitration, unless some sufficient reason, adequate in the circumstances, justifies its setting aside the terms of the contract and then exercising a discretion in favour of allowing the action to proceed. It is therefore obvious that the onus is on the person opposing the stay, that is, the present plaintiffs.

It is clear therefore that the exercise of the jurisdiction to stay proceedings is entirely discretionary. Once the court is satisfied that there is no sufficient reason as to why the matter should not be referred to arbitration in accordance with the agreement, the court will seldom refuse a stay (*Woh Hup (Pte) Ltd & Anor v Turner (East Asia) Pte Ltd* [1987] 1 MLJ 443). In allowing the application for stay of proceedings with costs, Syed Agil Barakbah J had this to say in *Lian Seng Construction Co v Yuzin* [1970] 1 MLJ 108 at p 108:

> Under s 5 of the Arbitration Ordinance, 1950, the court has a discretion in relation to such application but it is a discretion which, in the absence of any reason being shown to the contrary, should be exercised in favour of the applicant. This is in accordance with the principle stated in *Lim Su Sang v Teck Guan Construction and Development Co Ltd.* [1966] 2 MLJ 29 in which

Thomson LP quoted the views of Lord Selborne in the case of *Willesford v Watson* (1873) LR 8 Ch App 473 at p 480: A

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed, a prima facie duty is cast upon the courts to act upon such an agreement.

B

At p 111 of the same judgment, Syed Agil Barakbah J continued to say:

> I am satisfied that the defendant was at the time when the action commenced and is still willing to do and concur in all things necessary for causing the said matters to be decided by arbitration and has stated so in her affidavit. Although she is now temporarily away from the country, I am assured by her counsel that she will be available when the matter goes to arbitration. The C plaintiff has failed to show sufficient reason why the disputes should not be referred to arbitration. In the circumstances, the application for stay of proceedings is allowed with costs.

In *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113, Abdul Hamid J (who later D rose to be the Lord President of the Supreme Court) dealt with the issue of a stay of proceedings in this way (see pp 114–115 of the report):

> This application is made under s 5 of the Arbitration Ordinance 1950. The court is invested with the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration provided the applicant was, at the time when the proceedings were E commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.
>
> It would seem that the first defendant company was and still remains ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration. It would also appear that as between the plaintiff and the first defendant company, the matter in dispute may F conveniently be dealt with by an arbitrator.
>
> Mr VC George counsel for the applicant submitted that it is within the arbitrator's jurisdiction to make an award. He drew the court's attention to s 16 of the Ordinance which states that any award may, by leave of the court be enforced in the same manner as a decree, judgment or order to the same G effect.
>
> Being satisfied that the applicant brought itself within s 5 of the Arbitration Ordinance, it is for the plaintiff to satisfy me that there were good grounds for the case to proceed. (See *Allagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208).
>
> I am conscious that in law the decision lies with the discretion of the H court. However, this discretion must be founded upon judicial principles (see *Barnes v Youngs* [1898] 1 Ch 414 at p 418 (per Romer J); *Green v Howell* [1910] 1 Ch 495 at p 511 (per Buckley LJ)). It is for the court to consider whether the questions at issue are such as would be better decided by the court than by an arbitrator. In doing so the court will have regard to all the circumstances of the particular case (See *Bristol Corp v John Aird & Co* [1913] I AC 241).

His Lordship Abdul Hamid J (who later became the Lord President) concluded in these apt words as seen at p 115 of the report:

> Having regard to the circumstances of this particular case and in the light of the pleadings and the affidavits before this court, I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the first defendant company, a matter which it would seem to me to be outside the arbitrator's power to decide. In my view this is not the type of dispute that should be properly referred to an arbitrator. In other words I am satisfied that good grounds exist why this particular dispute should not be submitted to an arbitrator. I therefore refuse the application to stay proceedings to refer to arbitration.

The case of *D & C Finance Bhd v Overseas Assurance Corp Ltd* [1989] 3 MLJ 240 was also on the question of, inter alia, a stay of proceedings and Zakaria Yatim J (now FCJ) had this to say at p 242 of the report:

> The onus was on the plaintiff, which was opposing the stay, to give sufficient reasons why the differences should not be referred to arbitration. See *Lau You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181.

Next, in *Ismail bin Abd Halid & Ors v National Union of Newspaper Workers* [1993] 3 MLJ 541, Shankar J (who retired as JCA) reiterated the same principle at p 549 of the report:

> Section 6 of the Arbitration Act 1952, by its very terms is a discretionary provision, under which the court will only order a stay, 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement ...' It was for the Union to satisfy the court that there were such sufficient reasons and that arbitration was available in accordance with the terms of the rule.'

Finally, in *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309, the Supreme Court had this to say in regard to the scope of the discretion of the court in granting a stay:

> The language of s 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay. It is of course the court which must be satisfied that there is sufficient reason for the arbitration provision not to be complied with.

I must now take stock of the situation and make the following germane observations and rulings bearing in mind all the authorities alluded to in this judgment:

(1) Since the plaintiff respondent was opposing the stay the onus was on them to satisfy this court that there were good grounds for the case to proceed to trial. The plaintiff respondent had discharged that onus to the satisfaction of this court.

(2) There was affidavit evidence in encl 16 Or para 5 to the effect that the defendant appellant was able and willing to refer the matter to arbitration but the plaintiff respondent through Arif Nur Iswan affirmed an affidavit in encl 19 and at para 8 thereof it was deposed that the plaintiff respondent had filed an application for summary judgment for the sum of RM3,338,693.58 based on three interim certificates. Consequently, Arif Nuz Iswan rightly deposed that the filing of encl 17 was merely to delay and obstruct the plaintiff

respondent from proceeding with their summary judgment application. Arif Nuz Isman in para 7 of encl 19 contradicted the defendant appellant when he deposed that it was the plaintiff respondent who first sought to refer the matter to arbitration by enclosing a letter from Messrs JS. Pillay & Co dated 1 September 1998 detailing out the notice to concur in the appointment of a single arbitrator. The case of *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* supports the plaintiff respondent in so far as encl 16 of para 5 was contradicted by encl 19 of para 7.

(3) It was entirely discretionary on the court's part whether to grant the stay of proceedings and refer the matter to arbitration; a discretion that must be exercised judicially. I was satisfied that there was no sufficient reason for the matter to be referred to arbitration and once satisfied the next step would be to refuse the stay which I accordingly did. This meant that the appeal in encl 29 must be dismissed with costs.

(4) Having entered the conditional appearance following the format as laid out in Form 16 of the RHC, why did the defendant appellant seek to strike out the plaintiff respondent's writ of summons together with the Statement of Claim under O 18 r 18(1) of the RHC ? By seeking to strike out the plaintiff respondent's claim, the defendant appellant was submitting to the jurisdiction of this court. This would be the only inference that can be drawn when the defendant appellant incorporated prayer (1) to encl 17. It must be emphasised that the court will not accede to an application to strike out the writ or the pleading unless the case was wholly and clearly unarguable (*Resources Mining Pte Ltd v Puteh bte Abdullah & Ors* [1989] 3 MLJ 393; *Hubbuck's Sons, Limited v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 at p 91; *Attorney-General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274; *and Dyson v AG* [1911] 1 KB 410 at p 419). In my judgment, the defendant appellant must be precluded from obtaining a stay and taking advantage of the remedy of arbitration when they inserted prayer (1) in encl 17.

(5) The conduct of the defendant appellant in seeking prayer (1) of encl 17 clearly demonstrated a desire to abandon the application for a stay in favour of allowing the matter to proceed to trial. As I said the very act of the defendant appellant have the classical effect of invoking the jurisdiction of this court to proceed to hear the case in open court and not to refer the matter to arbitration nor to stay the matter. This was my judgment and I so hold accordingly.

(6) By seeking prayer (1) of encl 17, the defendant appellant had taken the necessary steps in the proceedings thereby precluding a stay and reference to arbitration. In my judgment, the defendant appellant did not unequivocally elect to refer the matter to arbitration. In the 'technical sense', the defendant appellant took a step in the proceedings thereby barring resort to s 6 of the Arbitration Act 1952. Clearly therefore the defendant appellant had no desire to stay the proceedings nor to refer the matter to arbitration. Incidentally, there

was no bar for the defendant appellant to file a stay of proceedings after entering a conditional appearance. Sadly this was not resorted to. Instead, the defendant appellant incorporated prayer (1) to encl 17.

Mr S Sagadeva, learned counsel for the plaintiff respondent, rightly pointed out that the affidavit in encl 16 that was filed in support of encl 17 did not advert to a single ground in support of the O 18 r 19(1) of the RHC's application for striking out the writ and the statement of claim. Indeed encl 16 was designed solely for a stay and a reference to arbitration without alluding to the grounds for striking out under O 18 r 19(1) of the RHC. But Mr S Sagadeva fell in error when he submitted that the defendant appellant should improvise Form 16 of the RHC. That would be going beyond the bounds of propriety. The RHC should be obeyed and not be surgically improvised by practising lawyers to suit their submissions. I am aware of the decision of Lord Denning MR sitting in the Court of Appeal in the case of *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 where at p 361, his Lordship remarked:

> On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the courts of law instead of arbitration.
>
> Applying this principle, the defendants here were presented with a writ indorsed with a statement of claim which was very defective. They applied, quite properly, to strike it out. That was not an affirmation of the correctness of the proceedings. Quite the contrary. It was a disaffirmation of them. It was not a 'step in the proceedings' such as to debar the defendants from applying for a stay.

and, consequently, his Lordship allowed a stay and referred the matter to arbitration. Earlier on at p 360, Lord Denning MR traced the events that led the matter to the Court of Appeal and this was what his Lordship said:

> On 3 December 1976 Eagle Star issued a writ against Yuval. They ignored the arbitration clause and issued a writ on which was indorsed the statement of claim. It said:
>
> > 'The plaintiffs claim is: (1) for damages for breaches of contracts of reinsurance made between the plaintiffs and the defendants in or about 1967; (2) for a declaration that the defendants are liable to the plaintiffs under the aforesaid contracts.
> >
> > Particulars. The aforesaid damages amounted to 69,610.21 pound as at 10 November 1976, full particulars of which have been supplied to the defendants and exceed three folios.'
>
> That indorsement was very defective. There were several contracts of reinsurance in 1967. It does not specify which is the contract that is sued upon. It claims damages at large without giving the slightest indication of the nature Or the breach or of the way in which the damages arise.
>
> Seeing that the indorsement was so very defective, Yuval applied to strike it out. They took out a summons on 21 December 1976 under RSC, O 18 r 19, and alternatively under the inherent jurisdiction of the Court, asked that:
>
> > '... the Statement of Claim herein be struck out or amended on the ground that it may prejudice embarrass or delay the fair trial Or the action

or is otherwise an abuse of the process of the Court and that in the meantime all proceedings herein be stayed.'

Faced with that application, Eagle Star themselves abandoned their very defective statement of claim. They replaced it by another in which they gave proper particulars. They specified several treaties and gave particulars of sums claimed amounting in all to £69,610.21. They took out a summons under O 14 for summary judgment against Yuval.

The Yuval company resisted that summons. They also took out a summons to stay the proceedings on the ground of the arbitration clause. Both summonses came before Mr Justice Parker in the Commercial Court. He refused to stay the action. He held that Yuval had taken a 'step' in the proceedings, and therefore it was not open to them to apply to have the matter sent to arbitration. So he gave judgment for the full amount with interest; but, pending an appeal, he gave a stay on £20,000 being paid into court. Now there is an appeal to this court.

Indeed it was very clear that the writ and the so-called specially endorsed Statement of Claim in the Eagle Star were vague in the extreme and completely inaccurate. It failed to specify what contract or contracts that were sued upon and it alleged that the claim was for damages whereas in truth it was for moneys due under the contract. Thus, it was not surprising that Lord Denning M.R. arrived at that decision and his decision was agreed upon by Lord Justice Shaw who wrote a short concurring judgment. In our present case, it was totally unknown on what basis the defendant appellant sought to strike out the plaintiff respondent's claim under O 18 r 19 (1) of the RHC as the affidavit in support in encl 16 failed to itemise the defects in the writ and the statement of claim like what Yuval did in the *Eagle Star*'s case. Be that as it may, after giving anxious consideration to the arguments advanced by both parties, I have no hesitation in dismissing encl 29 with costs. The matter should proceed to trial and, with this in mind, I gave the earliest dates of hearing available in this court's calendar, namely 13, 14 and 15 March 2000.

This judgment did not go into the merits of the case. It would have been more satisfying and gratifying to listen to the arguments based solely on the merits of the case. This was not to be. And this was the desire of the parties. The strength or weakness of the present case must await the decision of this court after the trial proper. In the meantime, patience is the best anecdote to while away the time.

Reported by Jafisah Jaafar